UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 16-24077-CIV-GOODMAN
[CONSENT CASE]

ESTRELLITA REYES,

Plaintiff,

v.

BCA FINANCIAL SERVICES, INC.,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO STAY PROCEEDINGS

Defendant BCA Financial Services, Inc. moves to stay these proceedings pending a ruling by the Eleventh Circuit Court of Appeals on BCA's petition under Federal Rule of Civil Procedure 23(f) to pursue an interlocutory appeal of the Court's class certification order. [ECF No. 169]. Plaintiff Estrellita Reyes filed an opposition response, and BCA filed a reply. [ECF Nos. 170; 172]. Several reasons (outlined below) support Plaintiff's opposition, and the Court therefore **denies** the motion to stay.[1]

First, because appellate courts rarely grant Rule 23(f) petitions, district courts disfavor motions to stay based on those petitions. *Bacon v. Stiefel Labs., Inc.*, 837 F. Supp.

[1] Because the second Court-ordered mediation has already taken place, the Court also **denies as moot** BCA's request to cancel the mediation pending the Rule 23(f) petition.

2d 1280, 1282 (S.D. Fla. 2011) ("Because this type of appeal is rarely granted by appellate courts, district courts disfavor a stay of district-court proceedings pending a Circuit Court's ruling on permission to pursue an interlocutory appeal."); *accord A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, No. 16-CV-62610, 2017 WL 4868985, at *2 (S.D. Fla. June 16, 2017) (denying motion to stay pending Rule 23(f) petition and noting that the Eleventh Circuit grants such petitions "sparingly"). Indeed, as Reyes points out in her opposition response, BCA did not cite to any cases in its motion where a court *granted* a stay because of a pending Rule 23(f) petition. And, most tellingly, BCA's reply does not cite any such cases, either, despite being aware of Reyes's point that BCA's motion lacked legal authority favoring its position on this basic point.

Second, this case is in an advanced litigation posture: it has been pending since September 2016, discovery is over, and the Court has already ruled on summary judgment and class certification. Thus, the fact that this case is closer to the end than the beginning weighs against a stay pending an interlocutory appeal. *A&M Gerber Chiropractic*, 2017 WL 4868985, at *2 (explaining, when denying motion to stay pending Rule 23(f) petition, "that this case is in an advanced litigation posture, further weighing against a stay").

Third, although BCA argues that the "death knell factor" is the most important one in the stay analysis, it did not submit any actual *evidence* of irreparable harm. Instead, it merely proffered conclusory rhetoric. And BCA did not present any evidence

in its reply, either, which is significant given that Reyes also highlights in her opposition response the absence of evidence of irreparable harm.

Merely saying that it would need to incur additional fees, costs, and expenses is hardly sufficient to establish irreparable harm to BCA. *See, e.g., Sunbeam Prod., Inc. v. Hamilton Beach Brands, Inc.*, No. 3:09CV791, 2010 WL 1946262, at *4 (E.D. Va. May 10, 2010) ("The mere fact that this action will go forward, and that litigating it will cost money, is an insufficient reason to warrant a stay."). Likewise, just raising the issue of costs does not present a convincing death knell theory. Litigants always incur additional fees, costs, and expenses if a requested stay were to be denied.

Moreover, to the extent BCA's "death knell factor" argument mirrors its "one-way intervention" argument (i.e., that certifying a class after granting summary judgment in Reyes's favor means that BCA will lose at trial), the Court has repeatedly rejected that position.

Fourth, contrary to BCA's position, staying this case for an indefinite time would prejudice Reyes. *See, e.g., Harnish v. Frankly Co.*, No. 5:14-CV-02321-EJD, 2015 WL 1064442, at *4 (N.D. Cal. Mar. 11, 2015) (denying stay in TCPA case, reasoning, in part, that "a stay for an indeterminate amount of time would result in delay and prejudice towards Plaintiff").

Fifth, and last, whether to stay this case is ultimately a discretionary act. *See A&M Gerber Chiropractic*, 2017 WL 4868985, at *2 (explaining that whether to stay a case

is "a decision that is subject to the district court's discretion"). At bottom, the Court is not comfortable exercising its discretion to stay late-stage proceedings pending a rarely-granted Rule 23(f) petition, and especially given the lack of authority and evidence of irreparable harm from BCA and the prejudice that Reyes would suffer from a stay of indefinite duration.

DONE and ORDERED in Chambers in Miami, Florida, on December 10, 2018.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All counsel of record